SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Miscellaneous

Rules

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-1422

MURRAY KAPLAN, *Petitioner,*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

Motion of the American Library Association to File an Amicus Curiae Brief in Support of Petition for Rehearing.

The American Library Association, founded in 1876, is a nonprofit, educational organization, with its principal place of business located in Chicago, Illinois. Its membership includes more than 30,000 librarians, libraries and members of the general public who are devoted to the development of library services in the United States.

The Association is the chief spokesman for the modern library movement in North America and, to a considerable extent, throughout the world. Through its membership and its affiliation with its constituent state library associations, the American Library Association represents over 29,000 public university and special libraries, over 90,000 elementary and secondary school libraries and media centers and over 120,000 librarians.

The American library is an institution unique to American culture and tradition. Through it, citizens are provided essentially free access to books, periodicals, magazines, records, microfilms, pamphlets, films and other materials which they desire or require to satisfy their intellectual, emotional, recreational or professional interests.

Libraries and librarians have historically resisted efforts to limit their collections to those materials reflecting attitudes, ideas and literary styles bearing the imprimatur of governmental authority. American librarians, in contrast to librarians in totalitarian states, have not developed their collections with a view to protecting or reenforcing a particular set of contemporary community ideologies, attitudes or standards. Rather, they have sought to include in their collections books and other materials presenting all points of view concerning the problems, issues and attitudes of our times.

Nor have libraries and librarians sought to inquire into the uses made of their collections by their patrons. On the contrary, libraries have sought to encourage the widest possible dissemination and utilization of library resources by all citizens, regardless of their race, creed, color, national origin, sex, age or educational background.

In sum, American libraries and librarians have never functioned as agencies for the dissemination of propaganda or as censors of public morality. They have supported the public's freedom to read as an essential element of the intellectual freedom required by free men to remain free. They are committed to the principle that free communication is essential to the preservation of a free society and a creative culture.

This is not to say that libraries have not been subjected to heavy and continuing pressures from those elements which recognize the potential power of the library as a censorship tool. Yet, despite such pressures libraries have successfully resisted the assumption of censorship functions relying on this Court for ultimate vindication.

The decisions of the Supreme Court rendered on June 21st of this year suggest that such reliance was misplaced. Those decisions, including the one to which this Motion is addressed, in the opinion of the Association, permit the imposition of censorship functions on libraries and librarians which would fundamentally change their traditional role in support of intellectual freedom and would fundamentally alter the nature and content of their collections and the dissemination of such collections to the people.

Among the specific problems created by the June 21st decisions, but left unresolved by the Court, are the following:

1. How does a librarian determine whether or not a work in its collection, having sexual content, is to be used by a patron for permissible scientific purposes as opposed to impermissible recreational purposes? As presently organized, libraries have no capacity for the interrogation of their patrons as to their uses of library resources. This fact poses the further question of whether materials having sexual content must be separately identified, catalogued and segregated from the main collection in order to prevent their use for recreational purposes.

2. Must every work having sexual content acquired by a library be reviewed to determine

whether, taken as a whole, it has serious literary, artistic, political or scientific value? If this is required, may the librarian reviewing the book be liable to criminal prosecution as well as fine or imprisonment if a jury ultimately determines that the work is obscene under contemporary community standards? Librarians do not, in most cases, review their acquisitions prior to purchase. Rather, they purchase on the basis of published reviews, of requests from patrons, and on a blanket order basis from publishers and booksellers. A requirement that all works be reviewed for obscene content would have a significant impact on library operations and cost, because the presence of obscene content could not be determined without a review of the entirety of all works.

3. Where a library, for example, a state or regional library, serves more than one community having varying laws governing obscenity, what contemporary community standard is to be applied? The answer to this question directly affects the stocking and operations of intercommunity bookmobile programs, interlibrary loan policies and policies governing the issuance of library cards to nonresidents. These programs, long supported by educators and encouraged by state, local and federal government, are all designed to maximize library resources and reduce taxpayer costs.

4. May the unilateral decision of a librarian *not* to acquire a work on the ground that it is obscene be challenged by an author or publisher on the ground that such determination, at least to

the extent made by a public library, constitutes state action in violation of their First Amendment rights? Moreover, would not such decision subject the library or librarian to a trade libel action?

The view of the impact on the libraries expressed by Mr. Justice Douglas in his dissenting opinion in *Paris Adult Theatre v. Slaton* (Slip Opinion, 3) coincides with the view of libraries and librarians. If the decisions of the Court are to be taken literally, the American library system as we now know it will be destroyed. Beyond question, confronted with the prospect of reviewing all works they seek to acquire, libraries will acquire only those which enjoy the imprimatur of governmental authority; confronted with the prospect of criminal prosecution, librarians will omit from their collections any work which might be actionable; confronted with the prospect of meeting different and potentially conflicting "contemporary community standards", librarians will restrict their collections and services to a single community.

It is simply beyond the training or capacity of librarians or library trustees to determine, at their peril, whether a work is "serious", whether it is "patently offensive", or whether it "appeals to the prurient interest" of the "average person". As a practical matter, many works in a library collection are not "serious", for a library satisfies the people's need for entertainment and recreation as well as edification. Moreover, the seriousness of literature is frequently a matter of perspective. Thus, the Mother Goose Tales, which have entertained so many children for so many years, were viewed as very "serious" and scurrilous attacks by the censors who once banned them.

The responses of libraries and librarians described are not speculative. Based on extensive discussions with librarians throughout the Nation, they are certainties. The librarian has no economic interest in a book to justify his defense of it or its inclusion in his collection at the risk of his personal freedom. The sole justification of a librarian in the defense of any work is his philosophical conviction that the freedom to read is the essence of intellectual freedom and intellectual freedom is the price of liberty. In the face of the Court's June 21st decisions, the librarian may rightly conclude that the Court has priced intellectual freedom out of the marketplace of ideas.

If, on the other hand, Mr. Justice Douglas is wrong and the "net now designed by the Court" as it affects librarians cannot be taken "literally", it would appear appropriate for the Court to make that fact known, so that the communities now devising obscenity legislation may be instructed.

It takes but a short while to purge a library collection. Hitler accomplished it in one night. On the other hand, it takes centuries to create a collection, and it takes the continuing dedication of thousands of librarians to preserve that collection. Libraries have known "dark ages" before when collections have been destroyed and disbursed, literary works suppressed, access to unpopular information foreclosed, and ideological conformity substituted for intellectual freedom.

Librarians ask leave to submit this Brief in support of petitioner's Petition for Rehearing in the hope that

America's Dark Age will not date from June 21, 1973. In so doing, *amicus* respectfully requests the Court:

1. To reconsider and reject its statement that the First Amendment is limited to protecting works which, taken as a whole, have *serious* literary, artistic, political or scientific value; and

2. To reconsider and reject its holding that the right to read is not fundamental and implicit in the concept of ordered liberty, except in one's home; and

3. To reconsider and reject the view that distributors of books and other media of expression may be held criminally liable for distributing an "obscene" work before there has been a judicial determination, in a civil proceeding, establishing that the work is obscene.

Amicus asks leave to file the annexed Brief in this case. Petitioner has consented to the filing of this *amicus curiae* Brief, and respondent has not yet replied to *amicus'* request for consent.

WILLIAM D. NORTH,
E. HOUSTON HARSHA,
By E. HOUSTON HARSHA,
Attorneys for Amicus Curiae.

KIRKLAND & ELLIS,
Of Counsel.

BRIEF AMICUS CURIAE FOR AMERICAN LIBRARY ASSOCIATION.

Interest of the Amicus.

The interest of *amicus* is set forth in the Motion for Leave to File this Brief.

ARGUMENT.

I.

The First Amendment Is Not Limited to Protecting Works Which, "Taken as a Whole, Have Serious Literary, Artistic, Political or Scientific Value". To So Limit the Reach of the First Amendment Would Work a Drastic Undermining of Free Speech.

In *Miller v. California,* the Court said: "The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the Government or a majority of the people approve of the ideas these works represent." (Slip Opinion, 20). Never before has the First Amendment been thought limited to expressions of *serious* literature or political value. *Paris Adult Theatre v. Slaton* (Brennan, dissenting, Slip Opinion, 25). See, *Gooding v. Wilson,* 405 U.S.518; *Cohen v. California,* 403 U.S.15, 25-26; *Terminiello v. City of Chicago,* 337 U.S.1, 4-5. Giving protection only to "serious" works will likely have the effect, as Justice Brennan observed, "of permitting a far more sweeping suppression of sexually oriented expression, including expression that would almost surely be held protected under our current formulation" (*Id.,* 24). Under the "new" rule, all a prosecutor need do

is satisfy a jury that the value of the work, measured by some unspecified standard, is not sufficiently "serious" to warrant constitutional protection. "That result is not merely inconsistent with . . . *Roth*, it is nothing less than a rejection of the fundamental First Amendment premise and rationale of the *Roth* opinion and an invitation to widespread suppression of sexually oriented speech." (*Id.*, 25).

Only a year ago, this Court said that above all else:

> ". . . [T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan.* . . ." (*Police Dept. of City of Chicago v. Mosley*, 408 U.S.92, 95-96).

In *Stanley v. Georgia*, 394 U.S.557, the Court, citing *Winters v. New York*, 333 U.S.507, stated that it is irrelevant "that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too illusive for this Court to draw, if indeed such a line can be drawn at all." (394 U.S. at 566). In *Winters*

v. New York, 333 U.S. at 510, the Court rejected the suggestion that the constitutional protection for a free press applies only to the exposition of ideas. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature."

In *Burstyn v. Wilson,* 343 U.S.495, 501, Justice Clark observed that motion pictures although designed to entertain and to make money are nevertheless "a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. . . ."

Mr. Justice Harlan, in *Cohen v. California,* 403 U.S.15, 24, his last major opinion dealing with the First Amendment, emphasized that the constitutional right of free expression "is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premises of individual dignity and choice upon which our political system rests." Justice Harlan rejected the notion that it is pos-

sible to suppress a "trifling" expression without adversely affecting fundamental First Amendment rights. "That is why '[w]holly neutral futilities * * * come under the protection of free speech as fully as do Keats' poems or Donne's sermons' . . . and why 'so long as the means are peaceful, the communication need not meet standards of acceptability.' . . ."

Expression, Justice Harlan said, serves a dual communicative function: "It conveys not only ideas capable of relatively precise detached explication, but otherwise inexpressible emotions as well." Words, he observed, "are often chosen as much for their emotive force as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated. . . ." (403 U.S. at 26).

Justice Harlan, citing Justice Frankfurter, observed that one of the prerogatives of American citizenry is the right to speak "foolishly" and without moderation. In conclusion, Justice Harlan stated:

> "Finally, and in the same vein, we cannot indulge the facile assumption that one can forbid particular words without also running substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views. We have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results." (403 U.S. at 26).

If, as the Court suggests, the First Amendment only protects works with serious literary, artistic, political or scientific value, it would appear to follow that works deemed "political trifles" are not constitutionally protected. It cannot be repeated too often that governmental efforts at thought control can rarely be confined to questions of manners and taste. The yearning to use governmental censorship of any kind is infectious. It tends to spread insidiously. The heady power that comes with the suppression of "sexy" books deemed not "serious" will inevitably spill over into the areas of religion, politics and elsewhere.

> "Plato, who detested democracy, proposed to banish all poets; and his rulers were to serve as 'guardians' of the people telling lies for the people's good, vigorously suppressing writings these guardians thought dangerous. Governmental guardianship is repugnant to the basic tenet of our democracy: According to our ideals, our adult citizens are self-guardians, to act as their own fathers, and thus become self-dependent. When our government officials act toward our citizens on the thesis that 'Papa knows best what's good for you,' they enervate the spirit of the citizens: To treat grown men like infants is to make them infantile, dependent, immature." (Judge Frank, concurring in *United States v. Roth*, 237 F.2d at 823).

Amicus recognizes the force of the statement in *Paris Adult Theatre v. Slaton* (Slip Opinion, 13-14), that if "good" books, plays and art lift the spirit, improve the mind, enrich the human personality and develop character, then "bad" works may have a

contrary effect. But "under the Constitution as written there are no standards of 'good' or 'bad' for the press". *Dyson v. Stein*, 401 U.S.200, 212 (Justice Douglas, dissenting).

As librarians and as persons interested in libraries, we stake out a lofty claim for the value of books. We do so because we believe that they are good, possessed of enormous variety and usefulness, worthy of cherishing and keeping free. We realize that the application of these propositions may mean the dissemination of ideas and manners of expression that are repugnant to many persons. We do not state these propositions in the comfortable belief that what people read is unimportant. We believe rather that what people read is deeply important; that ideas can be dangerous; that they can be "clinically explicit and offensive to the point of being nauseous"; but that the suppression of the freedom to read is fatal to a democratic society. Freedom itself is a dangerous way of life, but the First Amendment has committed us to that way.

In light of the above, *amicus* respectfully urges the Court to grant the Petition for Rehearing and reaffirm that the First Amendment protects not only the serious works of today but the "neutral futilities", "mere entertainments" and political "trifles" which may be the shards from which the future may know us. These "neutral futilities" played a useful part in striking layers of prudery from a subject long irrationally kept from needed ventilation". (*Miller v. California*, Slip Opinion, 22).

II.

The Right to Read Is a Fundamental Personal Right Implicit in the Concept of Ordered Liberty. This Right May Be Exercised in Libraries, as Well as in the Home.

In the case at bar, the Court, for the first time, addressed itself to the issue of whether an unillustrated book can be legally "obscene" in the sense of being unprotected by the First Amendment.[1] Recognizing that a book "seems to have a preferred place in our hierarchy of values, and so it should", the Court nevertheless held that the book *Suite 69* was outside the protection of the First Amendment.

The Court also held that while a constitutional right of privacy existed for a person reading or viewing an "obscene" work at his home, no similar right existed outside the home. The Court said:

> "Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included 'only those personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S.319, 325.' *Roe v. Wade*, 410 U.S.113, 152 (1973)." (*Paris Adult Theatre v. Slaton*, Slip Opinion, 16).

The suggestion that *Palko v. Connecticut, supra,* supports the proposition that the right to read is not a fundamental right is erroneous. Quite to the contrary,

---

[1]In the quarter of a century since this Court affirmed, by an equally divided court, a conviction for the sale of the "obscene" book *Hecate County*, by Edmund Wilson, one of America's foremost men of letters, *Doubleday & Co., Inc. v. New York*, 335 U.S.848 (1948), no other unillustrated book has been found obscene by this Court.

Justice Cardozo made it crystal clear that the right to read *is* fundamental and central to "every other form of freedom". Speaking for the Court, Justice Cardozo said:

> "Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of action. The extension became, indeed, a logical imperative when once it was recognized, as long ago it was, that liberty is something more than exemption from physical restraint. . . ." (302 U.S. at 327).

It is also hard to understand how *Roe v. Wade, supra,* supports the Court on this issue. In that case, the Court held that a woman has a constitutional right to have an abortion. It is difficult for *amicus* to comprehend how that right can be deemed more fundamental to the concept of ordered liberty than the right to read.

Roth itself recognized the fundamental nature of the right to read about all matters of public concern.

> ". . . The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for *information and education with respect to the significant issues of the times.* Freedom of discussion, if it would fulfill its historic function

> in this nation, must embrace *all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.*" (Emphasis added.) *Roth*, 354 U.S. at 487-488. See also, *Thomas v. Collins*, 323 U.S.516, 531 (1945) ("the rights of free speech and a free press are not confined to any field of human interest").

Even *United States v. Reidel*, 402 U.S.351, 355-356, recognized that *Stanley* held that the right to read was a personal fundamental right protected by the Constitution, at least in one's home. *Griswold v. Connecticut*, 381 U.S.479, 482, specifically stated that "the right of freedom of speech and press includes the . . . right to read".

There is nothing in any of the Court's prior decisions which so much as suggests that this fundamental right to read is not broad enough to include reading a book of one's choice in a library, or taking a book from a library to read at home.

To equate the reading of books with the disposal of garbage and sewage (*Paris Adult Theatre v. Slaton*, Slip Opinion, 15), is to demean the great meaning of the First Amendment. A long and undeviating line of cases establishes that allegedly obscene books cannot be treated like gambling paraphernalia or narcotics, nor, it is respectfully submitted, may they be equated with garbage or sewage. In *Smith v. California*, 361 U.S.147, the Court drew a constitutional distinction between the kind of guilty knowledge required on the part of a person charged with violating the food or drug laws and a person charged with violating the obscenity laws. After observing that the usual

rationale for such statutes is that the public interest in the purity of its food is so great as to warrant the imposition of the highest standard of care on distributors, the Court said:

> "There is no specific constitutional inhibition against making the distributors of foods the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller." (361 U.S. at 152-153).

Mr. Justice Frankfurter, concurring, observed that:

> "... [T]here is an important difference in the scope of the power of a State to regulate what feeds the belly and what feeds the brain. . . . The balance that is struck between [the general principle that awareness of what one is doing is a prerequisite for the infliction of punishment] and the overriding public menace inherent in the trafficking in noxious food and drugs cannot be carried over in balancing the vital role of free speech as against society's interest in dealing with pornography." (361 U.S. at 162).

In *Marcus v. Search Warrants of Property*, 367 U.S. 717, the Court held that the State's power to suppress obscenity is limited by the constitutional protections for free expression. The Court held that the State of Missouri could not treat "obscenity" in the same way that it could treat gambling paraphernalia or other contraband. In *Quantity of Copies of Books v. Kansas*, 378 U.S.205, the Court asserted the same proposition, saying:

> "It is no answer to say that obscene books are contraband, and that consequently the standards

governing the searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband." (378 U.S. at 211-212).

Quoting from *Marcus*, the Court stated:

" 'The authority to the police officers under the warrants issued . . . poses problems not raised by the warrants to seize "gambling implements" and "all intoxicating liquors" involved in the cases cited by the Missouri Supreme Court. . . . For the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications. ". . . [T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . ." It follows that, under the Fourteenth Amendnent, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech.' " (378 U.S. at 212).

In *Roaden v. Kentucky* and *Heller v. New York*, the Court again recognized that law enforcement officials cannot treat allegedly obscene books the way they can treat gambling paraphernalia or narcotics.

The issue is not, it is submitted, whether the right to read is fundamental and implicit in the concept of ordered liberty. Our whole constitutional heritage, and

virtually every prior case decided by this Court, attest to the fact that the right exists. The critical issues are whether the State has a compelling interest in prohibiting consenting adults from exercising their right to read; whether California Penal Code Section 311.2 is necessary to the accomplishment of a permissible state policy; and whether California Penal Code Section 311.2 is sufficiently narrowly drawn as not to impinge on constitutionally protected rights.

There is no compelling state interest in preventing persons, who have a constitutional right to read an "obscene" book at home, from reading such a book in a library, or from taking such a book from a library to their homes.

In the case at bar, the Court gave the following justification for interfering with an adult's right to read a book of his choice:

> "For good or ill, a book has a continuing life. It is passed hand to hand, and we can take note of the tendency of widely circulated books of this category to reach the impressionable young and have a continuing impact. A State could reasonably regard the 'hard core' conduct described by *Suite 69* as capable of encouraging or causing antisocial behavior, especially in its impact on young people. States need not wait until behavioral experts or educators can provide empirical data before enacting controls of commerce in obscene materials unprotected by the First Amendment or by a constitutional right to privacy. We have noted the power of a legislative body to enact such regulatory laws on the basis of unprovable assumptions." (*Kaplan v. California*, Slip Opinion, 5).

Initially it should be observed that measuring the impact of a book, under a general obscenity statute, by its impact on youth is a flat repudiation of the rule unanimously laid down by the Court in *Butler v. Michigan*, 352 U.S.380. In *Butler*, Justice Frankfurter, speaking for the Court, held unconstitutional a Michigan obscenity law that made it an offense for a bookseller "to make available for the general reading public . . . a book . . . found to have a potentially deleterious influence upon youth" (352 U.S. at 382-383). In *Butler*, as in the case at bar, the book was in fact sold to a police officer. Michigan argued that it was "reasonable" to quarantine "the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence. . . ." (352 U.S. at 383).

In striking down the Michigan statute, Mr. Justice Frankfurter stated:

> "We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children. It thereby arbitrarily curtails one of those liberties of the individual, now enshrined in the Due Process Clause of the Fourteenth Amendment, that history has attested as the indispensable conditions for the maintenance and progress of a free society. . . ." (352 U.S. at 383-384).

In *Roth*, the Court incorporated the *Butler* decision, holding that under a general obscenity law, the challenged work must be measured solely by its impact on the average adult.

The Court's statement herein that the book in question was "capable of encouraging or causing antisocial behavior, especially in its impact on young people" is the purest speculation and without any empirical support. In *United States v. Roth*, 237 F.2d 796 (2d Cir. 1956), Judge Frank, after examining the literature as of that date, concluded that there is no basis for believing that "obscenity" induces antisocial behavior. (237 F. 2d at 812-817). The same conclusion was reached, with even more emphasis, in *Stanley v. Georgia*, 394 U.S.557, 566.

The *Report of the Commission on Obscenity and Pornography* reached the same result after two years of study and after engaging in approximately sixty independent scientific research projects to determine what effect "obscene" material had on people. The Commission concluded that:

> "If a case is to be made against 'pornography' in 1970, it will have to be made on grounds other than demonstrated effects of a damaging personal or social nature. Empirical research designed to clarify the question has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behavior among youth or adults." (*Commission Report*, 139).

This empirical investigation "supports the opinion of a substantial majority of persons professionally engaged in the treatment of deviancy, delinquency and antisocial behavior, that exposure to sexually explicit materials has no harmful causal role" in the areas of crime, delinquency or sexual deviancy. (*Commission Report*, 52).

Two of the Commissioners who endorsed the majority conclusion were Dr. Morris A. Lipton and Dr. Edward D. Greenwood.[2] They filed a separate statement in which they stated:

> "We would have welcomed evidence relating exposure to erotica to delinquency, crime and antisocial behavior, for if such evidence existed we might have a simple solution to some of our most urgent problems. However, the work of the Commission has failed to uncover such evidence. Although the many and varied studies contracted for by the Commission may have flaws, they are remarkably uniform in the direction to which they point. This direction fails to establish a meaningful causal relationship or even significant correlation between exposure to erotica and immediate or delayed antisocial behavior among adults. To assert the contrary from the available evidence is not only to deny the facts, but also to delude the public by offering a spurious and simplistic answer to highly complex problems." (*Commission Report*, 380).

Dr. G. William Jones, an ordained Methodist clergyman, as well as an educator, stated:

> "As a clergyman, and as one who follows a Leader who said, 'I am . . . the Truth,' and 'They shall know the Truth and the Truth shall set them free,' I believe that the search for truth is a liberating, and thus a holy, quest and that science has often proven itself to be God's handmaiden in

[2]Their credentials are set forth in the *Commission Report*, 634, 638. The qualifications of all of the Commissioners are found in the *Report*, 634-639.

this quest. Although many religious persons may be distressed by the findings of our research, they must certainly rejoice that misconceptions and prejudices are being replaced by knowledge, and that our concern and efforts may now be redirected toward what appears to be the surer roots of the sexual maladies of our people.

"I have long been concerned that the burden of blame and the therapy of re-education be focused on the true sources of the sexual crimes and maladjustments which plague our country and its citizens. If certain kinds of books or films had been proven the cause, then I was quite willing to join in the crusade against them. However, it has been very adequately shown through our research that the roots of such behavior lie in the home and in the early years of family and sibling relationships. It is good, I believe, to stop chasing what may have been our unconscious scapegoats in the media and to concentrate these energies instead upon the kind of re-education of the family which will make for health and sanity." (*Commission Report*, 374-375).

Even the dissenters—Father Hill and Reverend Link—failed to base their case in support of government control of obscenity on the proposition that "obscenity" incites antisocial conduct. They said:

"The government interest in regulating pornography has always related primarily to the prevention of moral corruption and *not* to prevention of overt criminal acts and conduct, or the protection of persons from being shocked and/or offended." (*Commission Report*, 385) (emphasis in original).

It thus appears that in the case at bar there is no sufficiently compelling reason to justify the interference with the right of free persons to read what they choose.

In *Paris Adult Theatre v. Slaton* (Slip Opinion, 11), the Court said:

> "Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist."

With all deference, we suggest, that on the available evidence Georgia could not reasonably determine that there is a causal connection between antisocial behavior and obscene material. As Drs. Lipton and Greenwood stated:

> "To assert [that there is such a relationship] is not only to deny the facts, but also to delude the public by offering a spurious and simplistic answer to highly complex problems."

Freedom of speech and press cannot be limited on such a slender showing. The State has not only failed to make a compelling showing to justify the deep intrusions of First Amendment rights, but has failed to justify the intrusion even "rationally".

In *Paris Adult Theatre v. Slaton* (Slip Opinion, 15), the Court recognized the standing of a theatre operator to assert the right of his customers to view films of their choice. Librarians have even greater standing to assert their patrons' right to read. In California, for

example, the Legislature has recognized the importance of public libraries, saying:

> "The legislature hereby declares it is in the interest of the people of the State that there be a general diffusion of knowledge and intelligence through the establishment and operation of public libraries. Such diffusion is a matter of general concern inasmuch as it is the duty of the State to provide encouragement to the voluntary lifelong learning of the people of the State.
>
> "The legislature further declares that the public library is a supplement to the formal system of free public education, and a source of information and inspiration to persons of all ages, and a resource for continuing education beyond the years of formal education, and as such deserves adequate financial support from government of all levels." (California Education Code §27000).

It follows, *amicus* suggests, that a patron of a library has a right to read in the library any book of his choice, and similarly has a right to take home from his library any book that is of interest to him, without regard to the content of the book. That right, we submit, *is* fundamental and *is* implicit in the concept of ordered liberty.

III.

To Subject a Distributor of Books or Other Media of Expression to Criminal Prosecution for Distributing an "Obscene" Work Prior to the Time That There Has Been a Judicial Determination of Its Obscenity Is a Denial of Due Process of Law and Constitutes Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments to the United States Constitution.

In the nature of things, librarians are particularly vulnerable to the threat of prosecution under state obscenity laws. It is the duty of librarians to collect and disseminate works of the widest possible interest and diversity. Some of these works may be thought obscene by local law enforcement officials emboldened by the Court's opinion herein, and the related cases.[3]

---

[3]In Oklahoma City, for example, the District Attorney stated that under this Court's decision the only books that were safe were *Rebecca of Sunnybrook Farm* and *Black Beauty*. (Okla. Journal, June 22, 1973). At the present time, the bestselling work of fiction is *Once Is Not Enough* by Jacqueline Susann, and the bestselling work of nonfiction is *The Joy of Sex* by Alex Comfort. *The Joy of Sex* is replete with pictures of the ultimate sex act and *Once Is Not Enough* is replete with descriptions thereof. Both books can be found in most major libraries. Whether a jury will find they are "serious" works is of course a matter of the purest conjecture. Relying on this Court's decision of June 21st, the Georgia Supreme Court has just condemned as obscene the film "CARNAL KNOWLEDGE", directed by the award-winning Mike Nichols. Following this Court's decision, Salt Lake City, Utah, law enforcement officials vowed that they would seize "LAST TANGO IN PARIS" if it came to town. Jason Epstein of Random House, who edited the book *Portnoy's Complaint* by Philip Roth, said, "There is nothing that protects 'Portnoy' or anything now." In Kansas City, Mo., a county circuit judge ordered the destruction of 127 different magazines and books seized in police raids. In Cleveland, a major bookseller removed the magazine "Playgirl", featuring a nude of George Maharis in the centerfold. In Boise, Idaho, "Playboy" was removed from the racks. (Los Angeles Times, July 8, 1973, Part VII, 5).

Because the crime of "obscenity" is so vague and arbitrarily enforced, a judicial determination prior to the initiation of a criminal prosecution is required by the Due Process Clause of the Fourteenth Amendment and by the Cruel and Unusual Punishment Clause of the Eighth Amendment as the same is incorporated into the Fourteenth Amendment.

In *Paris Adult Theatre v. Slaton,* the Court stated that a procedure pursuant to which a challenged work's obscenity is judicially determined in a civil proceeding provides a distributor "the best possible notice, prior to any criminal prosecution, as to whether the materials are unprotected by the First Amendment and subject to state regulation." (Slip Opinion, 5).

Justice Douglas, dissenting in *Miller v. California* (Slip Opinion, 4-5), expressed the view that such a prior determination was constitutionally required to satisfy the "fair notice" requirement of the Due Process Clause. After commenting on the difficulty the Court has had trying, unsuccessfully, to define obscenity, he argued that obscenity could not be defined because it deals with subjective matters of taste. "What shocks me may be sustenance for my neighbor. What causes one person to boil in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. . . . Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts. . . . Under the present regime—whether the old standards or the new ones are used—the criminal law becomes a trap." Justice Douglas argued that "until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained. . . . In any case—certainly when constitutional rights are involved—we should not

allow men to go to prison or be fined when they had no 'fair warning' that what they did was criminal conduct". (*Id.*, 4-6).

If a specific book has been condemned as obscene in a civil proceeding, and thereafter a person distributes that particular work, then, Justice Douglas stated, "a vague law has been made specific". A criminal prosecution brought at that juncture "would not violate the time-honored void-for-vagueness test. . . . Obscenity—which even we cannot define with precision—is a hodge-podge. To send men to jail for violating standards they cannot understand, construe and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process." (*Id.*, 6-7).

A. The "New" Standards Proscribing Obscenity, Like the "Old" Standards, Are Hopelessly Vague and "Unworkable".

1. There is unanimity of opinion in the June 21, 1973 decisions on only one point—that the *Roth* test has failed to give adequate guidance as to what material was criminal and what material was unconditionally protected by the free speech and press provisions of the First Amendment. In *Miller v. California*, the Court tracked the various obscenity decisions since *Roth* and concluded they were "unworkable." Justice Brennan, the author of *Roth*, stated that his experience had convinced him that "the approach initiated 15 years ago in *Roth* . . . and culminated in the Court's decision today, cannot bring stability to this area of the law without jeopardizing fundamental First Amendment values, and I have concluded that the time has come to make a significant departure from that approach." (Justice Brennan, dissenting in *Paris*, Slip

Opinion, 1). He went on to say that the Court's efforts to implement *Roth* "demonstrate that agreement on the existence of something called 'obscenity' is still a long and painful step from agreement on a workable definition of the term", and that he was reluctantly forced to the conclusion that "none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level while at the same time striking an acceptable balance between the protections of the First and Fourteenth Amendments, on the one hand, and on the other the asserted state interest in regulating the dissemination of certain sexually oriented materials". Thus, concluded Justice Brennan: "As a result of our failure to define standards with predictable application to any given piece of material, *there is no probability of regularity in obscenity decisions by* state and lower federal *courts.*" (Emphasis added).

2. From a vagueness point of view, it is certainly true that the differences between the "new" formulation and the "old" one, are, "for the most part, academic." (Justice Brennan, dissenting in *Paris*, Slip Opinion, 22). As Justice Brennan pointed out, the first element of the Court's "new" test is virtually identical to the *Memoirs* requirement that "the dominant theme of the material taken as a whole [must appeal to a prurient interest in sex]. (383 U.S. at 418). Under the "new" standard, the test is "whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest."

Justice Black, dissenting in *Ginzburg v. United States*, 383 U.S.463, 478-479, stated that "human beings, serving either as judges or jurors, could not be expected to give any sort of decision" concerning pru-

rient interest "which would even remotely promise any kind of uniformity in the enforcement of this law." He observed that the determination of whether material appeals to "prurient interest in sex" would depend on subjective reactions rather than on evidence such as can ordinarily be given in a criminal case. "In the final analysis, the submission of such an issue . . . to a judge or jury amounts to nothing more than a request for the judge or juror to assert his own personal beliefs about whether the matter should be allowed to be legally distributed. Upon this subjective determination the law becomes certain for the first and last time." The same observations are of course true with regard to whether material is "patently offensive" to community standards. Similarly, the test of "seriousness" is extraordinarily vague. What is serious to a truck driver with only an elementary education would, almost certainly, be found to be "frivolous" by a Ph.D. To paraphrase what Justice Black stated in *Ginzburg* concerning social value: "This element seems to me to be as uncertain . . . [as] the unknown substance of the Milky Way. If we are to have a free society as contemplated by the Bill of Rights, then I can find little defense for leaving the liberty of American individuals subject to the judgment of a judge or jury as to whether material that provokes thought or stimulates desire is [a work having serious literary, artistic, political or scientific value]. . . . Whether a particular treatment of a particular subject [is or is not 'serious'] in this evolving, dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, professors, philosophers, scientists, religious groups or any other type of group. A case-by-case assessment of

['seriousness'] by individual judges and jurors is, I think, a dangerous technique for government to utilize in determining whether a man stays in or out of the penitentiary."

Justice Black's conclusion in *Ginzburg* is still true today: "My conclusion is that . . . no person, not even the most learned judge, much less a layman, is capable of knowing in advance of an ultimate decision in his particular case by this Court whether certain material comes within the area of 'obscenity' as that term is confused by the Court today." This is the identical conclusion reached by Justice Brennan, dissenting in *Paris Adult Theatre v. Slaton* (Slip Opinion, 20), where he said:

> ". . . The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so."

3. In the June 21 decisions, the Court recognized, as heretofore noted, that the *Roth* test was unworkable. The Court expressed the hope that its revised *Roth* test could be made "workable" by shifting the burden of identifying obscenity to the jury. This approach was tried in the past, and failed. In *United States v. Levine*, 83 F.2d 156, 157 (2 Cir. 1936), Judge Learned Hand stated that obscenity "is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a small bit of legislation ad hoc. . . ." There can never be, he said, "constitutive principles for such judgments, or indeed more than cautions to avoid the personal aberrations of the jurors."

In 1957, Judge Hand returned to the same theme. Speaking at the proceedings of the American Law Institute during the deliberation of Model Penal Code Tentative Draft No. 6, dealing with obscenity, Judge Hand said obscenity "cannot be defined", and he therefore objected to "an attempt to define the indefinable" (34 A.L.I. Proceedings, 191 [1957]). Judge Hand concluded that "we must not try to be definite. We must leave it to the jury to say, is this obscene? Is it contrary to what you all think ought not to be? . . . The attempt to mix in with this an objective standard . . . seems to me to be absurd." (*Id.*, 192).

To entrust to a jury the responsibility of separating constitutionally protected speech from criminal speech is to abandon the rule of law to the "personal aberrations" of the jurors. Where the "crime" cannot be defined and where, as here, the issue generates "tremendous emotional outbursts" (Justice Douglas, dissenting in *Miller*, Slip Opinion, 4), this is particularly true.

Justice Douglas correctly stated in *United States v. Vuitch*, 402 U.S.62, 80, that the subject of obscenity is an inflammatory one. "People instantly take sides and the public, from whom juries are drawn, makes up its mind one way or the other before the case is even argued." Since the statutory guides are extremely broad and subjective, juries have a wide range to vote their prejudices, and those who circulate books have no reliable guidelines. Justice Black, dissenting in *Ginzburg v. United States*, 383 U.S.463, 480, expressed the same view, stating that the submission of an issue of the obscenity of material to a jury "amounts to practically nothing more than a request for the . . .

juror to assert his own personal beliefs about whether the matter should be legally distributed".

In *United States v. Roth*, 237 F.2d 796 (2 Cir. 1956), Judge Frank pointed to the danger of entrusting to a jury the protection of First Amendment rights in an obscenity prosecution. Initially, he observed that "no statistician would conceivably accept the view of a jury—twelve persons chosen at random—as a fair sample of community attitudes on such a subject as obscenity. A particular jury may voice the 'moral sentiments' of a generation ago, not of the present" (237 F.2d at 822). In an obscenity case, he said, each jury constitutes "a tiny autonomous legislature. Any one such legislature, as experience teaches, may well differ from any other in thus legislating as to obscenity. And, one may ask, was it the purpose of the First Amendment, to authorize hundreds of divers jury-legislators, with discrepant beliefs, to decide whether or not to enact hundreds of divers statutes interfering with freedom of expression?" (237 F.2d at 822-823). Judge Frank also commented upon the stultifying effect on literature of permitting juries to decide what literature should be preserved and what literature should be consigned to the bonfire. "To vest a few fallible men—. . . jurors—with vast powers of literary or artistic censorship, to convert them to what J. S. Mill called 'a moral police', is to make them despotic arbiters of literary products. . . . An author's imagination may be cramped if he must write with one eye on juries." (273 F.2d at 825).

It is to be remembered that no expert testimony or any other evidence need be submitted to the jury once the challenged work is placed in evidence. If no evidence is needed by jurors in obscenity cases (*Paris*

Adult Theatre v. Slaton, Slip Opinion, 7, n.6), then the "trial" becomes a mockery. Each juror is then free to vote his "personal opinion" rather than to find the facts. Too frequently that "personal opinion" will not be his own but the one he believes he is expected to hold.

The heavy reliance the Court has now placed upon the jury in obscenity cases should be viewed against the background of *Williams v. Florida,* 399 U.S.78, and *Apodaca v. Oregon,* 406 U.S.404. In *Williams,* the Court held that a State was not required to afford a defendant a jury of 12, and that a jury panel of six members did not violate the defendant's Sixth Amendment rights as applied through the Fourteenth Amendment. The Court said: ". . . [W]hile in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible. Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. . . ." (399 U.S. at 100-102).

In *Apodaca v. Oregon,* and the related cases, the Court held that the Sixth Amendment guarantee of a jury trial made applicable to the States by the Fourteenth Amendment does not require that the jury's vote be unanimous.

In criminal jury cases, the defendants are often stripped of their right to *voir dire* a jury. See, Rule 24(a) Federal Rules of Criminal Procedure, 18 U.S.C.A.; *United States v. Addonizio,* 451 F.2d 41,

65, 66 (3 Cir. 1972), cert. denied 405 U.S.935; *Silverthorne v. United States*, 400 F.2d 625, 638 (9 Cir. 1968), cert. denied 400 U.S.1022.

In a recent obscenity case, *United States v. Hamling, et al.*, 9th Cir. No. 72-1892, *et seq.*, ... F.2d .... (June 7, 1973), the Court held it was not error for the trial court to refuse "to ask prospective jurors questions on voir dire designed to expose their biases and prejudices concerning 'obscenity' and sex." In that case, the defendants were denied all opportunity to ask questions on such subjects as reading habits, film viewing, attendance at place of worship and the like. The Ninth Circuit said of the trial court rulings:

> "The handling of those questions not asked was clearly within the range of the District Court's discretion in the matter and no clear abuse of the discretion nor prejudice to the appellants has been shown." (Slip Opinion, 10-11).

In *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1955), the Court warned against the dangers in leaving jurors free to speculate as to the obscenity of questioned material.

> "Even if the jury did not consist of twelve carefully selected Anthony Comstocks, it might well believe that the predominant appeal of certain acknowledged works of art, sculpture and literature found in all our well-known museums and libraries would be to the prurient interest of the average person, or perhaps someone else. But if that be so, can we allow the censor's stamp to be affixed on the basis of an uninformed jury's misconceptions?" (350 F.2d at 167).

Later, the court stated that unless the jury was tightly controlled and supervised, "a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity." (350 F.2d at 170). Recognizing the dangers inherent in merely showing the challenged material to jurors and permitting them to decide whether it was "obscene", the Court said:

> ". . . [I]t would be altogether too easy for any prosecutor to stand before a jury, display the exhibits involved, and merely ask in summation: 'Would you want your son or daughter to see or read this stuff?' A conviction in every instance would be virtually assured."

It is against this background that *amicus* insists that subjecting librarians to emotionally charged criminal obscenity trials under admittedly vague standards is a sheer denial of Due Process of Law. As bad as censorship is, if we are to embark upon such a course, let there at least be the fair warning of a prior judicial decree of what is to be censored. A librarian should not be forced to be both a censor and a defendant in a criminal case.

B. Subjecting a Distributor of Books or Other Media of Expression to Criminal Prosecution for Distributing an "Obscene" Work Prior to the Time That There Has Been a Judicial Determination of Its "Obscenity" Is Cruel and Unusual Punishment.

In *Furman v. Georgia*, 408 U.S.238, 309, 310, Justice Stewart, concurring, stated that the death sentences involved in those cases were "cruel and unusual in the same way that being struck by lightning is cruel and unusual". He pointed out that of all people convicted of rapes and murders in the years in question,

"the petitioners were among a capriciously selected random handful upon whom the sentence of death has in fact been imposed". Accordingly, he concluded that the Eighth and Fourteenth Amendments stood as a bar to the infliction of a penalty on so "wanton" and so "freakish" a basis. (408 U.S. at 310).

Justice Douglas, in his concurring opinion, stated that the Eighth Amendment "was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature" (408 U.S. at 242). He emphasized that there is increasing recognition of the fact that "the basic theme of equal protection is implicit in 'cruel and unusual' punishments. 'A penalty . . . should be considered unusually imposed if it is administered arbitrarily or discriminatorily." (408 U.S. at 249). The high service rendered by the "cruel and unusual" punishment Clause of the Eighth Amendment "is to require legislators to write penal laws that are even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not appled sparsely, selectively, and spottily. . . ." (408 U.S. at 256). Justice Douglas found the death penalty statutes unconstitutional because they "are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments" (408 U.S. at 257).

Justice Brennan, concurring, expressed similar views. The Eighth Amendment, he said, means "that the State must not arbitrarily inflict a severe punishment". This is so because "the State does not respect human dignity when, without reason, it inflicts upon people a severe punishment that it does not inflict upon others.

Indeed the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments." (408 U.S. at 274).

It is plain that persons subject to the obscenity law are subject to severe punishment. At the present time, there is pending in the Court the case of *McCrary v. Oklahoma*, No. 72-1648 (41 L.W.3658), wherein a bookseller was sentenced to a 10-year jail term for possessing allegedly obscene books. In *Aday v. United States*, 388 U.S.447, the petitioner was sentenced to 25 years in jail for transporting allegedly obscene works. To a librarian, a criminal accusation is severe punishment, involving as it does the whole criminal process pursuant to which people are arrested, kept in jail for endless hours, and required to post bail.

To throw a librarian into the arena of the criminal courts to be exposed to public opprobrium, to be paraded before a jury for doing his job and to expect him to risk his freedom and security on the judgment of an uncontrolled jury selected without reference to their qualifications to appreciate literary values, is to subject the librarian to a game of Russian Roulette.

All of this uncertainty and unwarranted risk could be avoided if the State was required to initiate civil proceedings to determine whether the questioned work was obscene, before permitting the bringing of criminal proceedings. Such civil proceedings would adequately serve the purposes of the State in suppressing the circulation of allegedly obscene works without at the same time inflicting arbitrary criminal punishment on persons who cannot reasonably know in advance whether they are circulating constitutionally protected works or criminal works.

Conclusion.

The June 21, 1973 decisions mark a radical break from past decisions of the Court affording the broadest possible protection to books and other media of expression, regardless of their content. *Amicus* believes that this departure from traditional First Amendment principles was made without the Court having had the opportunity to consider the decisions' far-reaching chilling effect on librarians and others who traditionally circulate the press. Granting a Rehearing in which *amicus* may fully present its views would, we hope, prove helpful to the Court in formulating standards that conform to traditional principles and procedures for protecting freedoms of speech and press. These precious freedoms are "vulnerable to damaging but barely visible encroachments". In the case at bar, the encroachments are glaring, and carry the potential for extraordinary abuse. Accordingly, the Court should grant the Petition for Rehearing and reconsider its judgment herein.

Respectfully submitted,

WILLIAM D. NORTH,
E. HOUSTON HARSHA,
Attorneys for Amicus Curiae.

KIRKLAND & ELLIS,
Of Counsel.